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IN THE

SUPREME COURT OF THE UNITED STATES

1948 TERM

BEN L. BEETS, PETITIONER,

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, Ben L. Beets, respectfully prays for writ of certiorari and review of the judgment of the Court of Appeals, Tenth Circuit, denying the petitioner's motion to dismiss the appeal taken by the Government in the matter of Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas, Appellant, vs. Ben L. Beets, Appellee, No. 3886 in said Court of Appeals.

OPINIONS BELOW.

The judgment of the District Court discharging this petitioner from the custody of the respondent warden was not reported. The judgment of the Court of Appeals denying the motion to dismiss the appeal was a formal order. Certified printed transcript of record on file in said Appeal No. 3886, and typewritten copies of the further record, which includes petitioner's motion to dismiss the appeal and the order denying said motion, are before this court.

JURISDICTION.

Judgment of the Court of Appeals denying the motion to dismiss the appeal was entered May 11, 1949. Jurisdiction of the Supreme Court is invoked under Judicial Code, Sections 1254 and 2101, Title 28.

SUMMARY OF MATTER INVOLVED.

Petitioner was an American Combat soldier with the Third Armored Division in Germany. He was court-martialed and sentenced to life imprisonment on a charge of rape. While imprisoned at the United States Penitentiary, Leavenworth, Kansas, petitioner filed habeas corpus proceedings which were heard January 21 and 22, 1948, by the Honorable Alfred P. Murrah, Judge of the United States Court of Appeals (Printed T. 86-140), and on the 22nd day of January, 1948, judgment was entered, discharging the petitioner from custody (Printed T. 138, 19-25). On January 29 and 30, 1948, the Government filed motions for new trial (Printed T. 25-27)

and on January 30, 1948, filed motion to vacate the judgment (Printed T. 28). Hearing on the motions was April 7, 1948, (Printed T. 146). Said motions for new trial and to vacate judgment were overruled December 30, 1948 (T. 85). Notice of appeal by the Government was served and filed February 24, 1949, (Printed T. 86). This petitioner's motion to dismiss the appeal for lack of jurisdiction was filed April 9, 1949, (Typewritten T. 1) and was denied May 11, 1949 (Typewritten T. 6). This petitioner's motion to dismiss the appeal (omitting the supporting brief) was in words as follows:

> "Now comes the appellee, Ben L. Beets, and respectfully suggests that there exists a want of jurisdiction of this Honorable Court to hear and determine the appeal, and moves the dismissal of the appeal for want of jurisdiction.
>
> "Appellee states as follows:
>
> "1. That said cause was fully heard and determined on January 21 and 22, 1948, and judgment entered discharging appellee from imprisonment. (The judgment, findings, and conclusions, Record Pages 21-27, [Printed T. 138, 19-25] are by reference made a part of this motion.)
>
> "2. January 29, 1948, respondent's motion for new trial filed. (Record Pages 28-30, [Printed T. 25] by reference made a part of this motion.)
>
> "3. January 30, 1948, respondent's second motion for new trial filed. (Record Pages 31-32 [Printed T. 27] by reference made a part of this motion.)
>
> "4. March 12, 1948, respondent's motion to vacate judgment filed. (Record Pages 33-41 [Printed T. 28] by reference made a part of this motion.)

"5. December 30, 1948, orders entered overruling the foregoing motions. (Record Page 93 [Printed T. 85] by reference made a part of this motion.)

"6. February 24, 1949, respondent's notice of appeal filed.

"Appellee respectfully suggests as a ground for this motion to dismiss for want of jurisdiction the fact that motions for new trial and to vacate judgment are not recognized in Federal Habeas Corpus procedure as prescribed by Federal Statutes, and such motions do not operate to extend the time for taking an appeal from a final judgment discharging a Habeas Corpus petitioner from imprisonment."

QUESTIONS PRESENTED.

Motions for new trial and to vacate judgment are not recognized by the Federal Statutes pertaining to habeas corpus. Habeas corpus is statutory, and where judgment is entered in favor of the petitioner, discharging him from custody, appeal time is not extended by motions for new trial or to vacate judgment.

REASONS FOR GRANTING WRIT.

(a) Construction of the habeas corpus statutes and relation thereto of the Federal Rules are questions of substance which should be determined by the Supreme Court for guidance and convenience of lower courts and litigants.

(b) Conflict of opinion exists.

Holiday v. Johnston, 313 U. S. 342, 353.
Albert v. Patterson (1st), 155 F. 2d 429.
Hunter v. Thomas (10), 173 F. 2d 810.
Federal Rule 81 (a) (2).

In *Holiday v. Johnston*, 313 U. S. 342, 85 L. Ed. 1392, the Supreme Court held that Federal Rule 53, which authorizes references to a special master, does not apply in Habeas Corpus. The Court said in part:

> "Rule 81 (a) (2) provides that appeals in habeas corpus cases are to be governed by the rules, but that the rules are not applicable 'otherwise than on appeal' in habeas corpus cases 'except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity.' *** Since the practice in habeas corpus is set forth in plain terms in the Revised Statutes to which reference has been made Rule 53 has no application.
>
> "In summary, we hold that the provisions of the habeas corpus act, as embodied in the Revised Statutes, are too plain to be disregarded for any of the reasons advanced." (P. 353)

In *Albert v. Patterson* (1), 155 F. 2d 429, it was held that Federal Rule 52 (a) which requires findings of fact and conclusions of law on a trial before a District Court, does not apply to Habeas Corpus. There the Court said:

> "Nowhere in Chapter 14 of Title 28 of the United States Code Annotated is there any provision requiring findings of fact in habeas corpus proceedings.
>
> * * * * *
>
> And as already appears the Federal Rules of Civil Procedure apply to habeas corpus proceedings only on appeal, so that the part of Rule 52 (a) supra, requiring a trial court to make findings of fact and conclusions of law is inapplicable. *** (P. 433)"

In *Hunter v. Thomas,* (10th), 173 F. 2d 810, it was held that Civil Rule 59 does apply to habeas corpus, and the ruling is in conflict with the above decisions.

Furthermore, the decision (Hunter v. Thomas) is no proper guide to a correct ruling on the motion to dismiss this petitioner's case because the trial court denied the motions in petitioner's case. Where petitioner is discharged from custody, even right of appeal does not exist unless specifically given by statute. 25 Am. Jur., Habeas Corpus, Sec. 164. New trial is unknown to the history and law of habeas corpus.

Rule 81 of the Federal Rules of Civil Procedure, provides that:

> "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity; admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States. The requirements of U. S. C., Title 28, Paragraph 466, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force."

Habeas corpus procedure is set forth in the Statutes of the United States, and Federal Rules 59 and 60 are not applicable to Habeas Corpus proceedings.

The Federal Statutes are extensive on the subject of Habeas Corpus. The statutory procedure is found in Title 28, (Sections 451 to 466 of the Old Code), Sections 2241 to 2255 inclusive, of the New Judicial Code.

The fact that this New Judicial Code, effective September 1, 1948, reenacts the Habeas Corpus procedure contained in the Old Code effective at a date approximately one year after the effective date of the amendments to the Federal Rules of Civil Procedure is indication of the intention of Congress that Habeas Corpus continue to be governed by the Federal Statutes upon the subject.

In Section 2243 of the New Judicial Code the Congressional admonition is retained and reiterated that,

> "The Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

But in Section 2254 of the New Code, provision is made for an appeal from such final order disposing of the case. There is no recognition in either the old or the new Judicial Code of motions for a new trial, and such motions have no place in Habeas Corpus procedure.

CONCLUSION.

Petitioner respectfully prays that the Honorable Court cause the writ to issue.

Respectfully submitted,

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